Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-760

ROBERT LEVINE AND
CHARLOTTE LEVINE,

...Petitioners

V.

ROBERT M. STEIN, JOANNE STEIN, EDWARD S. STEIN,
ARTHUR H. STEIN, BARBARA S. FELDMAN, IULA V. LICHTENBERG,
TRUSTEE JOSEPH GOULD, SUBSTITUTE TRUSTEE
and LEWIS K. KESSER,

...Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No._____

ROBERT LEVINE

and

CHARLOTTE LEVINE,

Petitioners

v.

ROBERT M. STEIN, JOANNE STEIN, EDWARD S. STEIN, ARTHUR H. STEIN, BARBARA S. FELDMAN, IULA V. LICHTENBERG, TRUSTEE JOSEPH GOULD, SUBSTITUTE TRUSTEE AND LEWIS K. KESSER

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE FOURTH CIRCUIT

Petitioners Robert Levine and Charlotte Levine pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is recorded in the case of Levine v. Stein, 560 F. 2d 1175 (C. A. 4th 1977).

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Fourth Circuit was August 30, 1977. No re-hearing was requested. No order was entered granting an extension of time in which to petition for certiorari. The statutory provision believed to confirm this Court's jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I. Did the United States District Court for the Eastern District of Virginia, Norfolk Division have jurisdiction under 28 U.S.C.A. Section 1331, under the due process clause of the Fourteenth Amendment to the United States

Constitution to determine that the Virginia procedure as applied in this case relating to foreclosure of petitioners real estate by respondents by advertisement violates the due process clause of the Fourteenth Amendment to the United States Constitution?

II. Did the United States District Court have jurisdiction to vacate the judgments obtained against petitioners herein by respondent noteholders?

III. Did the United States District Court have jurisdiction to declare that all of the foreclosure sales mentioned in the complaint on real estate owned by petitioners be declared null and void on the ground that the three foreclosure sales took place by the power of sale given to the trustees in deeds of trust without any provision for a hearing to the Court prior to sale?

STATUTES INVOLVED

The statutes involved are:

1. The due process clause to the Fourteenth Amendment of the United States Constitution.

2. Section 55-59 (6), Code of Virginia to wit:

> "In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and shall take possession of the property and proceed to sell the same at auction at the premises or at such other place in the city or county in which the property or the greater part thereof lies..."

3. Section 55-59 (12), Code of Virginia to wit:

> "The clerk of the court upon admitting to record the deed of such trustee conveying property held in trust shall note a reference to same on the margin of the deed book where the deed or other writing conveying the property to such trustee in trust is recorded, if the same can be found in his office."

4. Section 55-58, Code of Virginia to wit:

> "A deed of trust to secure debts or

indemnify sureties may be in the following form, or to the same effect: "This deed, made the ... day of ..., in the year ..., between ... (the grantor), of the one part, and ... (the trustee), of the other part, witnesseth: that the said ... (the grantor) doth (or do) grant unto the said ... (the trustee), the following property (here describe it): In trust to secure (here describe the debts to be secured or the sureties to be indemnified and insert covenants or any other provisions the parties may agree upon). Witness the following signatures and seals (or signature and seal)." (Code 1919, Section 5166.)"

5. Section 55-62, Code of Virginia to wit:

"Notice of sale under any deed of trust whether the same be in conformity with Section 55-59 or not, in the absence of provision therein requiring other or additional matter, may be substantially in the form following:

Trustee's Sale of

.....
(brief description or identification of property)

In execution of a deed of trust, (name or names of grantor or grantors unless grantor or grantors request in writing that the same be omitted,) dated ..., recorded in the Clerk's Office of the ... court of ... in Deed Book ... page ..., the undersigned trustee will offer for sale

at public auction (a brief description of the property and place of sale (on the ... day of ..., nineteen hundred ..., at ... (ante meridian) (noon) (post meridian,) the property described in such deed.
Terms: (Cash) (....)

.....
Trustee(s)"

6. Section 26-15, Code of Virginia to wit:

"When sale is made under any recorded deed of trust, mortgage or assignment for benefit of creditors, otherwise than under a decree, there shall, within four months after the sale, be returned by the trustee to the commissioner of accounts of the court wherein the instrument was first recorded an account of sale. The commissioner shall state, settle and report to the court an account of the transactions of such trustee, and the same shall be recorded as other fiduciary reports. Any trustee failing to comply with this section shall forfeit his commissions on such sale, unless such commissions are allowed by the court. If the commissioner of accounts of the court wherein an instrument was first recorded is advised in writing by a party in interest that an account as required by this section has not been filed, the commissioner and the court shall proceed against the trustee in like manner and impose like penalties as set forth in Section 26-13, unless such trustee is excused for sufficient reason."

7. Section 26-16, Code of Virginia to wit:

"Every inventory and account of sales returned under Sections 26-12 and 26-15 shall be recorded by the clerk in what are known as will books, and indexed as required by Section 17-59. (Code 1919, Section 5405.)"

STATEMENT OF THE CASE

The United States District Court entered an order on August 30, 1976 dismissing the complaint of petitioners on the sole ground that it lacked jurisdiction to declare unconstitutional, under the Fourteenth Amendment to the United States Constitution involving the due process clause the Virginia foreclosure statutes, as related to this case, adjudicating that the Virginia statutes do not involve state action to trigger any Fourteenth Amendment claim. The United States Court of Appeals for the Fourth Circuit affirmed.

The complaint alleged jurisdiction under 28 U.S.C.A. Section 1331, under the due process clause of the Fourteenth Amendment to the United States Constitution.

Petitioners borrowed $110,000.00 from

respondents Robert M. Stein, Joanne Stein, Edward S. Stein, Arthur H. Stein and Barbara S. Feldman, evidenced by three promissory notes, secured by three separate deeds of trust, recorded in the Clerk's Office of the Circuit Court of the City of Norfolk, Virginia. Upon default in payment of the interest (15% per annum) the respondent noteholders instructed the trustees under the three deeds of trust to foreclose. Foreclosure sales took place on February 28, 1975, March 30, 1975 and October 21, 1975. Respondent noteholders purchased at foreclosure sales valuable real estate of petitioners known as the Naro Theatre Building and the Frazier Pharmacy property as high bidders in amounts far below the fair market value of the real estate. Their high bid was $11,000.00 for the Naro Theatre property which had a fair market value of at least $180,000.00 at time of foreclosure. Their high bid in the Frazier Pharmacy property was $32,000.00, although at the time of foreclosure

the fair market value was $75,000.00. Prior to the last foreclosure, petitioners offered to pay to respondent noteholders the full amount owed under the three deeds of trust, plus interest in default, plus delinquent taxes, advertising costs and reasonable attorney's fees that might be due under the notes. Respondent noteholders refused.

Petitioners were unsuccessful in their chancery suits in the State Court to set aside the three foreclosure sales. In addition, respondent noteholders obtained a deficiency judgment against petitioners.

REASONS FOR GRANTING THE WRIT

I. There was sufficient state action by the State of Virginia for the United States District Court to take jurisdiction. The common law mortgage does not exist in Virginia. The statutory deed of trust making it mandatory for a trustee to take possession of petitioners' real estate by Section 55-59 (6) together with the statutory forms for a permissible deed of

trust, a permissible notice of sale under the deed of trust involve sufficient state action for the court to take jurisdiction.

Moreover, the other Virginia statutes pertaining to release of deed of trust, the interpretation of meaning of phrases that may be included in a deed of trust, validating conveyances of real property under a deed of trust, construction of deedsrequiring notice by newspaper advertisement, disposition of surplus from trustee's sale after death of grantor, protection of assignees, transferees or endorsees of debts secured on real estate, marginal releases of deeds of trust, filing accounts of trustees under deeds of trust to a Commissioner of Accounts and providing for contempt action against trustees, requiring the Clerk to record every account of a trustee under a deed of trust sale, reveal the extensive state action involved in this case. See Sections 55-66.5, 55-58, 55-60, 55-60.1, 55-61.1, 55-62, 55-63, 55-64, 55-64.1, 55-65, 55-65.1, 55-66, 55-66.1, 55-66.2, 55-66.3,

55-66.4, 55-66.6, 55-66.7, 26-15, 26-16, Code of Virginia.

II. Jurisdiction to grant the prayer of the complaint under the due process clause of the Fourteenth Amendment to the United States Constitution is supported by Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed. 2d 556 (1972); Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 2d 349 (1969); Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

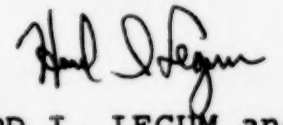
III. Section 55-59 (6), Code of Virginia, as a matter of law violates the holding of Fuentes v. Shevin, supra. The Virginia foreclosure statutes do not provide for a hearing to the court prior to the foreclosure sale. The only avenue of relief by petitioners was in the matter of self-help of seeking injunctive relief to the court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be

granted and that the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, with the direction for the United States District Court to take jurisdiction and hear the case on the merits.

Respectfully submitted,



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Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 33, paragraph 3(b), I certify that service was made on respondents Robert M. Stein, Joanne Stein, Edward S. Stein, Arthur H. Stein, Barbara S. Feldman, Iula V. Lichtenberg, Trustee Joseph Gould, Substitute Trustee, by depositing three printed copies of the Petition for Certiorari in a United States mail box, with first class postage prepaid, addressed to T. H. Willcox, Jr., Willcox, Savage, Lawrence, Dickson & Spindle, 1800 Virginia National Bank Building, Norfolk, Virginia, 23510, and to Lewis K. Kesser, 109 Bankers Trust Building, Norfolk, Virginia, 23510, this 28th day of November, 1977.

HOWARD I. LEGUM
Attorney for Petitioner, a member of the bar for the Supreme Court of the United States

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-2315

PUBLISHED

Robert Levine and
Charlotte Levine,

Appellants,

v.

Robert M. Stein, Joanne
Stein, Edward S. Stein,
Arthur Stein, Barbara S.
Feldman, Iula V. Lichtenberg,
Trustee, Joseph Gould,
Substitute Trustee, and
Lewis K. Kesser,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued June 7, 1977 Decided August 30, 1977

Before WINTER, RUSSELL and WIDENER, Circuit Judges.

Howard I. Legum (Fine, Fine, Legum and Fine on brief) for Appellants; T. H. Willcox, Jr. (James C. Howell, Willcox, Savage, Lawrence, Dickson & Spindle on brief) for Appellees.

PER CURIAM:

In the district court, plaintiffs sought to have three foreclosure sales declared illegal on the ground that the state statutes under which they were conducted were repugnant to the fourteenth amendment. Although plaintiffs did not assert their federal constitutional claim in the state proceedings, the validity of two of the sales was litigated in the state courts and upheld by the Virginia Supreme Court. The district court dismissed the complaint on the ground that the foreclosure proceedings under the statutes in question did not involve sufficient "state action" to support a claim allegedly arising under the fourteenth amendment. We agree.

The statutes in issue are Section 55-59, Code of Virginia, and Sections 26-15 and 26-16, Code of Virginia. Section 55-59 states that a deed of trust, unless the parties have agreed to the contrary, shall be construed to

impose and confer upon the parties the duties, rights and obligations set forth in the statute, including the right of the trustee, in the event of default in the payment of the principal of the debt or interest thereon, to take possession of the property and sell it at public auction after advertising the proposed sale as provided in the statute. The statute requires no application or intervention of any court or any judicial officer before the sale is conducted or title is vested in the purchaser.

Sections 26-15 and 26-16 relate to sales made under deeds of trust and similar instruments, and they require the trustee, after the sale has been completed, to return an account of sale to the Commissioner of Accounts of the court wherein the instrument is recorded. A trustee who fails to return the account shall forfeit his commissions on the sale and he may be subjected to other penalties, but apparently the validity of the sale remains unaffected

even if the trustee is in default in filing his account. Accounts, when filed, are recorded as public records.

Together with the district court, we think that on the authority of Barrera v. Security Building & Investment Corporation, 519 F.2d 1166 (5 Cir. 1975); Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6 Cir. 1975); and Bryant v. Jefferson Federal Savings and Loan Association, 509 F.2d 511 (D.C. Cir. 1974), the Virginia statutes do not involve sufficient state action to permit the plaintiffs to maintain a cause of action under federal question jurisdiction. The only authority which is cited to the contrary is the decision of a three-judge court in this circuit, Turner v. Blackburn, 389 F.S. 1250 (W.D. N.C. 1975). But for the reasons set forth in Barrera, 519 F.2d at 1170, n.5, we think Turner inapposite because of the differences between the North Carolina statutes with which it was concerned and the Virginia statutes before us in the instant case.

In the light of these conclusions, it is unnecessary for us to consider the defendants' contention that the adverse judgments against plaintiffs in the Virginia courts are res judicata of their federal claims.

A F F I R M E D.